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July 14, 2006

Honorable Jane Harman
Ranking Member
House Permanent Select
Committee on Intelligence
United State House of Representatives
Washington, DC 20530

RE: Support for H.R. 5371, the "Lawful Intelligence and Surveillance of Terrorists in an Emergency by NSA Act"

Dear Congresswoman and Ranking Member:

I strongly support enactment of H.R. 5371, the "LISTEN Act."

Since shortly after 9/11, President George W. Bush has been flouting the Foreign Intelligence Surveillance Act (FISA) in directing the National Security Agency to spy on American citizens on American soil on his say-so alone without a warrant issued by a FISA court. The President's illegal spying has persisted for approximately five years. He intends to continue the warrantless NSA spying indefinitely. He argues that "trust me" should be the measure of our civil liberties and privacy.

A major reason for the Constitution's checks and balances, even during wartime, is that the Commander in Chief may err in assessing national security dangers. Just ask the 120,000 Japanese Americans and resident aliens herded into concentration camps by President Franklin D. Roosevelt, with California Governor Earl Warren as cheerleader, without a shred of evidence of disloyalty. Just ask the countless who were spied on by Presidents Lyndon Johnson and Richard Nixon who were craving to discover evidence of foreign contributions to domestic opponents of the Vietnam War. At present, Congress is generally clueless as to how the NSA selects Americans for warrantless electronic surveillance, the value of the spying, or what is done with innocuous interceptions. History teaches that there is a non-trivial probability that the illegal spying is producing no useful foreign intelligence and should be abandoned as a matter of policy because it squanders limited resources.

Concerns about President Bush's lawlessness should not be allayed because current and ocular evidence of egregious spying abuses characteristic of a police state have not yet surfaced. The CIA, FBI, and NSA engaged in illegal mail openings, interceptions of international telegraphs, and spying for non-intelligence purposes for more than 20 years before the abuses and lawlessness were disclosed by the Church Committee in 1975-76. The Bush administration's fetish for secrecy makes problematic appraisal of the magnitude of the NSA's wrongdoing.

The recent decision of the United States Supreme Court in Hamdan v. Rumsfeld reinforced the flagrant illegality of the NSA's warrantless electronic surveillance targeting American citizens on American soil. The High Court dismissed President Bush's preposterous argument that the Authorization to Use Military Force (AUMF) crowned him with power to flout any federal statute in the name of fighting international terrorism. The Bush administration has defended the NSA's warrantless electronic surveillance program on the identical legal theory that Hamdan repudiated.

I would recommend additions to the bill. Congress should find that the overwhelming proportion of foreign intelligence gathered through electronic surveillance by the NSA is unencumbered by either FISA or the Fourth Amendment because the targets are aliens located abroad or lack any reasonable expectation of privacy. Thus, FISA regulates only a microscopic portion of the NSA's electronic surveillance.

Congress should also declare that it would be an impeachable offense subversive of the Constitution's checks and balances if the President continues to flout FISA despite enactment of the LISTEN Act.

Finally, Congress should address the consequences of past violations of FISA from the inception of the NSA's warrantless surveillance program until passage of the LISTEN Act. Congress should prohibit suppression of the illegally gathered evidence in any criminal or civil proceeding. It should correspondingly endorse a Bivens damage action for victims of the illegalities, subject to a customary good faith defense. Finally, criminal prosecutions should be barred absent proof that the accused acted in bad faith and with the specific intent of violating FISA.

The goal of the LISTEN Act should be to bring the Executive Branch back into a constitutional framework, not to seek political advantage or retribution. In the immediate aftermath of 9/11, fear of the unknown imbalanced many judgments. We should not be too harsh on officials who misjudged. To err is human, to forgive divine.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce Fein", with a stylized flourish at the end.

Bruce Fein